Supreme Court, U.S.
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No. 87-1013

# In the Supreme Court of the United States

OCTOBER TERM, 1987

MELVIN R. HORNE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the indictment was constructively amended by the proof at trial.

2. Whether the evidence was sufficient to sustain petitioner's conspiracy conviction.

3. Whether the district court's jury instructions on conspiracy constituted plain error.

4. Whether the district court properly instructed the jury on the defense of good faith.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The judgment order of the court of appeals (Pet. App. 4) is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on July 2, 1987. A petition for rehearing was denied on August 24, 1987 (Pet. App. 5). The petition for a writ of certiorari was filed on October 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner and his law partner, Mallory E. Horne, were charged in a 13-count indictment returned in the United States District Court for the Northern District of Florida. Count 1 of the indictment charged that from July 1, 1980,

to October 28, 1983, petitioner and Mallory Horne conspired with an unindicted co-conspirator, Robert John Dugan, to defraud the Internal Revenue Service in the collection of taxes (18 U.S.C. 371). The remaining counts charged petitioner and Mallory Horne with mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), and Travel Act violations (18 U.S.C. 1952). After a jury trial, petitioner was convicted of conspiring to defraud the Internal Revenue Service (Count 1), wire fraud (Count 2), mail fraud (Count 7), and use of an international wire communication to distribute the proceeds of an unlawful activity (Count 12). He was sentenced to five years in prison to be followed by five years of probation. Mallory Horne was acquitted on all charges. The court of appeals summarily affirmed (Pet. App. 4).

1. The evidence from the six-and-a-half week trial is set forth in detail in the government's brief in the court of appeals (at 1-16). The evidence showed that petitioner masterminded a money laundering operation to hide from the Internal Revenue Service (IRS) illegally obtained assets of Robert John Dugan, a drug smuggler and an unindicted co-conspirator. Besides Dugan's testimony, the evidence included a number of audio and video recordings of conversations between petitioner and an informant, Mark Stroud, as well as recordings of conversations between petitioner and an undercover FBI agent. During those conversations, petitioner outlined the method he used to launder Dugan's assets, he described the details of the scheme to defraud the IRS, he discussed the fraudulent documentation that he prepared to facilitate the scheme, and he rehearsed Dugan on the false scenario that Dugan was to present when questioned by law enforcement authorities. In addition, petitioner gave two confessions acknowledging that he laundered Dugan's drug money and

hid it from the IRS in an offshore corporation that he set up for that purpose.

2. In 1978, Dugan began importing marijuana and cocaine into the United States as a pilot or co-pilot on trips to South America. Following his arrest in November 1978 for marijuana smuggling, Dugan hired petitioner as his attorney and told petitioner about his plans to continue smuggling drugs. Using money derived from his drug smuggling activities, Dugan purchased a house in late 1978 and made $170,000 in cash improvements on it between 1979 and 1980. In July 1980, Dugan bought a Piper Aztec airplane for $73,000 in cash. Five months later, Dugan bought 160 acres of land in Levy County, Florida, to develop an airfield to hide and house smugglers' planes.

Petitioner handled the arrangements and paperwork for each of those transactions. He also told Dugan that the purchase of the assets in his own name would likely lead to an audit by the IRS and possible forfeiture of the assets because they were purchased with the proceeds of drug smuggling. In late 1980 and early 1981, Dugan asked petitioner to set up a scheme to launder his cash and property. Petitioner consulted with Mallory Horne, who arranged a meeting with Mark Stroud, a former bank vice president.

At a meeting on January 7, 1981, petitioner and his law partner told Stroud that Dugan was a convicted drug smuggler who had an airplane, a large tract of land and between $300,000 and $500,000 in cash that he needed to hide from the IRS. In a later meeting that same day, petitioner told Stroud that he needed to put Dugan's assets in someone else's name. Although Dugan was reluctant to use Stroud's services, he eventually agreed to have Stroud launder his money after petitioner and Mallory Horne assured him that Stroud could be trusted. Unknown to petitioner and Mallory Horne, however, Stroud was a government informant, and he alerted the FBI about the

scheme to hide Dugan's assets. In subsequent recorded meetings on January 15 and 26, 1981, petitioner discussed with Dugan and Stroud the details of a plan to hide Dugan's assets by placing them in the name of an offshore company. On January 29, 1981, petitioner and Stroud traveled to the Bahamas and set up the offshore company, Beauly Investments Ltd.

After he returned from the Bahamas, petitioner proceeded to create false documents to show that Beauly Investments Ltd. had lent Dugan money for the down payment on his house and the yearly payments on the 160-acre tract of land. In December 1981, petitioner created additional false documents showing that the 160-acre tract of land had been transferred to Beauly Investments Ltd. because Dugan had not repaid the loan. To explain the source of Dugan's income, petitioner also prepared a bogus employment contract between Dugan and Beauly Investments Ltd. reflecting that Dugan was the property manager of the 160-acre tract of land. Since the airplane was purchased before Beauly Investments Ltd. was formed, petitioner and Stroud arranged to have another individual, Donald Carter, listed as its owner.

On September 10, 1981, Stroud introduced petitioner to an undercover FBI agent, Matthew Pellegrino, who posed as a money launderer named Matthew Garfolo. Two weeks later, petitioner met with Pellegrino and discussed establishing offshore companies for two of Dugan's associates. Later in October 1981, petitioner asked Pellegrino to assist him in laundering $50,000 in cashier's checks that Dugan had withdrawn from his Cayman Islands account and made payable to petitioner. For a fee, Pellegrino agreed to negotiate the checks in order to prevent the funds from being traced back to Dugan or petitioner.

Throughout the period of the undercover operation, petitioner and Dugan continually expressed concern that the IRS would audit Dugan. In recorded meetings on October 20 and 22, 1982, petitioner met with Dugan and Pellegrino to plot a strategy to lie to the IRS about Dugan's finances. During those sessions, petitioner questioned Dugan to assure himself that Dugan understood the false explanation that he would give about where he obtained the money to purchase his assets and how those assets ended up in the names of other persons and entities. Petitioner, Dugan, and Pellegrino also discussed an additional $300,000 in traceable assets acquired by Dugan between 1978 and 1982 that had not yet been hidden by phony documents or offshore companies. Petitioner suggested a number of methods to conceal those assets, such as attributing certain monies to Dugan's deceased brother, preparing additional phony loans, destroying ledgers detailing Dugan's smuggling activities, characterizing money used to fund Beauly Investments Ltd. as a lease payment, and telling the IRS that Dugan only brokered the purchase of the Piper Aztec airplane. By the end of the meetings, petitioner, Dugan, and Pellegrino had made up explanations for all but $20,000 of the $300,000 in traceable assets.

On October 27, 1982, petitioner was interviewed by an IRS agent. Petitioner lied to the agent about Dugan's financial affairs. Consistent with the scheme he had set up, petitioner told the IRS agent that Beauly Investments Ltd. was a legitimate group of offshore investors and that Dugan had borrowed money from the company in connection with his purchase of the 160-acre tract of land. He also told the agent that the property had reverted to Beauly Investments Ltd. when Dugan was unable to repay the loans and that Dugan was employed by the company. To

support those claims, petitioner produced the fraudulent documents that he had prepared earlier.

3. In March 1983, FBI agents confronted Dugan with their evidence of the money laundering scheme, and he agreed to cooperate in the investigation. Subsequently, on October 28, 1983, a search warrant was executed at petitioner's law office. In the course of the search the agents seized the fraudulent documents prepared by petitioner to hide Dugan's assets, receipts reflecting petitioner's travel, and records of wire-transfers of money. After learning that Pellegrino was an FBI agent, petitioner stated that he wanted to see the United States Attorney. Later that evening, petitioner confessed twice to laundering Dugan's drug money through Beauly Investments Ltd.

## ARGUMENT

1. Petitioner first contends (Pet. 7-12) that the proof at trial constructively amended the indictment because the evidence showed that Dugan began cooperating with the government in March 1983, whereas the indictment alleged that the conspiracy continued until October 28, 1983. Petitioner argues that since Mallory Horne was acquitted and since petitioner could not have conspired with a government agent, the conspiracy count was constructively amended to allege that the conspiracy ended eight months earlier than alleged in the indictment. That argument is wholly without merit.

The jury's acquittal of Mallory Horne is plainly irrelevant to whether the indictment was constructively amended. A constructive amendment occurs when the evidence at trial or the jury instructions broaden the scope of the indictment by allowing a defendant to be convicted of an offense different from that charged in the indictment. See *United States* v. *Miller*, 471 U.S. 130, 135-145 (1985); *Stirone* v. *United States*, 361 U.S. 212, 218-219

(1960). That did not happen here; the proof at trial established the same conspiracy that was alleged in the indictment. The evidence that Dugan began cooperating with the government before the alleged termination date of the conspiracy did not alter an essential or material element of the conspiracy charged in the indictment. At most, that evidence narrowed the indictment by showing that the conspiracy was of shorter duration. It could not have prejudiced petitioner's right to be apprised of the charges against him or his right to plead the indictment as a bar to subsequent prosecutions. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962). Moreover, because the indictment alleged and evidence was introduced to show that petitioner also conspired with Mallory Horne, the mere fact that Dugan withdrew in March 1983 did not mean that the conspiracy terminated at that time.

2. Petitioner makes the related contention (Pet. 15-18) that the conspiracy was "legally impossible" because the evidence was insufficient to show that he conspired with either Dugan or Mallory Horne. That contention is predicated in the first instance on the erroneous assertion (Pet. 11-12) that petitioner could not be found guilty of conspiring with Dugan because Dugan became a government informant in March 1983. Petitioner's assertion is plainly wrong since a conspiracy is complete once there is an agreement to accomplish an unlawful object and one or more overt acts are undertaken to implement the agreement. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *United States* v. *Feola*, 420 U.S. 671, 694 (1975). In this case, the evidence showed that the conspiracy began in 1980 and that Dugan and petitioner actively participated in the money laundering scheme to defraud the IRS for two-and-a-half years before Dugan decided to cooperate with the government. To be sure, petitioner could not conspire with Dugan after Dugan began coop-

erating with the government. But Dugan's withdrawal in March 1983 did not affect either his or petitioner's liability for the conspiracy or the substantive offenses occurring prior to that time; it merely precluded Dugan from being liable for substantive offenses occurring after his withdrawal. See, *e.g.*, *United States* v. *Gonzalez*, 797 F.2d 915, 916-917 (10th Cir. 1986); *United States* v. *Marolla*, 766 F.2d 457, 461 (11th Cir. 1985); *United States* v. *Read*, 658 F.2d 1225, 1232 (7th Cir. 1981); *United States* v. *Monroe*, 552 F.2d 860, 864 (9th Cir.), cert. denied, 431 U.S. 972 (1977).

Petitioner's contention that a conspiracy was legally impossible is also predicated on the erroneous proposition (Pet. 16-18) that he could not have conspired with Mallory Horne because the jury acquitted Mallory Horne. As this Court has repeatedly made clear, jury verdicts need not be consistent, because a jury may render an erroneous verdict for reasons of lenity, compromise, or mistake. *United States* v. *Powell*, 469 U.S. 57, 65 (1984); *Standefer* v. *United States*, 447 U.S. 10, 22-25 (1980); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932). The jury's acquittal of Mallory Horne therefore is not equivalent to a finding by the jury that petitioner did not conspire with him. See *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 331-332 (5th Cir. 1980). Instead, the determination whether petitioner's conviction should be upheld is judged by the well-established principles governing review of the sufficiency of the evidence. *United States* v. *Powell*, 469 U.S. at 67. Under that standard of review, the evidence was clearly sufficient to establish that petitioner conspired with Mallory Horne as well as with Dugan.[1]

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[1] Petitioner relies (Pet. 16, 18) on the rule requiring consistency in conspiracy verdicts derived from *Herman* v. *United States*, 289 F.2d

3. Petitioner's real complaint (Pet. 10-11, 18-21) appears to be that the jury may have found him guilty of conspiring with Dugan after Dugan began cooperating with the government because the district court did not give the jury an instruction based on *Sears* v. *United States*, 343 F.2d 139 (5th Cir. 1965), to the effect that a person cannot conspire with a government informant. That contention is likewise meritless.

As petitioner concedes (Pet. 19), he neither requested a *Sears* instruction nor objected to the district court's failure to give the jury such an instruction. His claim therefore

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362 (5th Cir.), cert. denied, 368 U.S. 897 (1961). In *Herman*, the court held that the acquittal of all but one alleged co-conspirator in a joint trial mandates acquittal of the remaining co-conspirator. By its terms, that rule did not apply in this case because petitioner was charged with conspiring not only with Mallory Horne, but also with an unindicted co-conspirator, Dugan.

In any event, the validity of the rule articulated by the Fifth Circuit in *Herman* is doubtful. The *Herman* court cited no authority for the rule and it did not cite, discuss, or distinguish this Court's decisions in *Dunn* v. *United States, supra*, or *United States* v. *Dotterweich, supra*. Indeed, the Fifth Circuit has itself questioned the soundness of the rule and has "limited reliance on [the *Herman* rule] except in its narrowest application." *United States* v. *Davila*, 698 F.2d 715, 720-721 (5th Cir. 1983). See also *United States* v. *Albert*, 675 F.2d 712, 713 (5th Cir. 1982); *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 331-332 (5th Cir. 1980).

Most significantly, *Herman* was decided before this Court decided *United States* v. *Powell, supra*, and *Standefer* v. *United States, supra*. The only court of appeals to have recently reevaluated the *Herman* rule has concluded that it does not survive the *Powell* decision. See *United States* v. *Valles-Valencia*, 823 F.2d 381, 382 (9th Cir. 1987). See also *Government of the Virgin Islands* v. *Hoheb*, 777 F.2d 138, 142-143 (3d Cir. 1985) (Garth, J., concurring) ("the rule of consistency since *Standefer* and *Powell* is no longer a viable doctrine"). The Eleventh Circuit recently granted rehearing en banc to consider the issue. *United States* v. *Andrews*, No. 87-3109.

must be measured against the plain error standard. Fed. R. Crim. P. 30, 52(b); *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Moreover, petitioner did not argue before the court of appeals that the district court erred in failing to give a *Sears* instruction. Consequently, even the question whether the failure to give the additional instruction was plain error is not properly before this Court. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the plain error doctrine authorizes a reviewing court "to correct only 'particularly egregious errors,' * * * [and] is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982)). See also *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (in reviewing jury instructions, the plain error doctrine must be reserved for the "rare case"). No such error occurred here. In setting forth the essential elements of a conspiracy, the district court charged the jury that it was required to find that "one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or 'overt acts') described in the indictment" and that "such 'overt act' was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy" (Pet. App. 16). The ten overt acts set forth in the indictment (R.E. 22-23) were alleged to have occurred between January 8, 1981, and February 4, 1982, before Dugan began cooperating with the government. Accordingly, the district court's jury charge did not allow the jury to find petitioner guilty of conspiracy based on his association with Dugan after March 1983. The jury charge, therefore, clearly did not rise to the level of plain error.

4. Finally, petitioner contends (Pet. 12-15) that the decision below conflicts with *United States* v. *Hopkins*, 744 F.2d 716 (1984) (en banc), in which the Tenth Circuit held that a defendant charged with mail fraud and conspiracy to commit mail fraud is entitled to have the jury instructed on the defense of good faith when the instruction is timely requested and the evidence supports that defense. Petitioner, however, never claimed before the court of appeals that the district court's jury instructions on the defense of good faith were inadequate. Petitioner may not assert that claim now for the first time. In any event, petitioner's belated complaint about the jury charge is plainly without merit because the district court in fact instructed the jury on the defense of good faith.[2]

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[2] Petitioner characterizes (Pet. 20-21) the district court's jury instruction as "modified and abbreviated" and complains that the jury was not instructed on his theory of defense. To the contrary, the district court fully explained the good faith defense to the jury (R.E. 37):

> Good faith is a complete defense to those charges in the indictment alleging "intent to defraud" since good faith on the part of the defendant is inconsistent with intent to defraud or wilfullness which is an essential part of the charges. The burden of proof is not on the defendant to prove his good faith, of course, since he has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted with specific intent to defraud as charged in the indictment.
>
> One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent. On the other hand, an honest belief on the part of the defendant that a particular undertaking was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that undertaking, the defendant knowingly made false and fraudulent representations to others with specific intent to deceive them.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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